ARIZONA SUPREME COURT
Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings
Minutes
September 28, 2012

Members present:	Members present (cont'd):	Guests:
Hon. Robert Brutinel, Chair	Karen Arra	David Withey
Hon. Margaret Downie	David Bodney	Theresa Barrett
Hon. James Conlogue	Joe Kanefield	Melinda Hardman
Hon. Dan Dodge	Robert Lawless	Alden Anderson
Hon. Michael Jeanes, by his proxy, Chris Kelly	Robin Phillips	Jennifer Greene
	Kathy Pollard	
Hon. Eric Jeffery	Marla Randall	Staff:
Hon. Scott Rash	George Riemer	Mark Meltzer
		Ashley Dammen
Members not present:		Julie Graber
Hon. Janet Barton		

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1. Call to Order; approval of meeting minutes: The Chair called the meeting to order at 10:00 a.m. The Chair commented on the progress the committee has made, and he thanked the members for their hard work. He then asked the members to review the draft minutes of the August 30 meeting. A member suggested two edits (changing "on" the cloud to "in" the cloud at page 2; and adding "the" before "defendant" at page 6.)

> **Motion:** A member then made a motion to approve the August 30 minutes with these changes. The motion received a second and it passed unanimously. **Wireless 12-009**

2. Presentation on judicial ethics questions: The Chair asked Judge Downie and Mr. Riemer to identify judicial ethical questions raised by the new technology. Judge Downie is chair of the Judicial Ethics Advisory Committee ("JEAC"), and Mr. Riemer is Executive Director of the Commission on Judicial Conduct. Judge Downie said that almost half the judges have Facebook pages, and noted that today's meeting materials describe a variety of ethical issues arising from judges' use of blogs, Facebook, and other social media sites. She added that many judges use this new technology innovatively; as an illustration, she displayed a short YouTube video produced by two local judges regarding Maricopa County's new criminal court tower.

Judge Downie believes that neither Arizona nor other states have seen a need to amend their codes of judicial conduct because the existing rules sufficiently cover the new technology issues. Nevertheless, she believes it might be useful for the JEAC to issue an omnibus, formal advisory opinion concerning ethical issues presented by this technology and social media. She noted that different states have taken different approaches to these ethical issues. She characterized some of these approaches as "restrictive," and others as "more liberal." Judge Downie believes that the Code of Conduct for Judicial Employees probably does not require revision either, but it

would be helpful to develop fact scenarios to educate employees, for example, about what employees may post on social media sites regarding political issues. She noted that § 1-503 of the Arizona Code of Judicial Administration, the codified electronic communications policy of the judicial branch, might not fully address the nuances of social media use by court employees.

Mr. Riemer reviewed a variety of rules in the Code of Judicial Conduct that warrant consideration when a judge uses social media, including

- Rule 1.2: Promoting Confidence in the Judiciary
- Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office
- Rule 2.3(a): Bias or Prejudice
- Rule 2.4: External Influences on Judicial Conduct
- Rule 2.8: Decorum and Demeanor
- Rule 2.9: Ex Parte Communication
- Rule 2.10(a): Judicial Statements on Pending and Impending Cases
- Rule 2.11: Disqualification
- Rule 3.1: Extrajudicial Activities in General
- Rule 3.5: Use of Nonpublic Information
- Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

Mr. Riemer provided several examples of activities where a judge's conduct might raise an appearance of impropriety, such as:

- Friending someone (a lawyer, a party, a witness, a politician, or an appellate court judge) on Facebook
- Connecting with someone on LinkedIn
- Using a smart phone from the bench
- Blogging on law-related issues
- Participating in law-related listservs
- Tweeting on law-related issues

Mr. Riemer noted that social media use by court staff also implicates correlatively numbered provisions of the Code of Judicial Conduct for Judicial Employees. He agreed with Judge Downie's opinion that the principles of the existing rules adequately cover social media use by judges and employees. He cautioned that a rule in either of these codes might prohibit conduct that another rule might permit. He also agreed that judges and judicial staff could benefit from fact-specific guidance. Although few Arizona judges have requested advisory opinions on social media issues, an omnibus advisory opinion could be helpful in describing whether a violation occurs under a given set of facts. Mr. Riemer added that a judge could rely on a formal ethics opinion as a "safe harbor" to defend against an ethics complaint.

A common scenario that an omnibus opinion could address is whether a judge may "friend" an attorney or a litigant who appears before the judge. Although a social media "friend" may not be a friend in the ordinary meaning of the word, some litigants may nonetheless have an impression

that anyone who is the judge's social media friend has a preferential status with a judge. One member observed that while an attorney might create physical distance in a relationship with a judge while a case is pending, Facebook relationships are ongoing. Mr. Reimer said that a variety of these ethics issues predate social media. For example, in a complex case with multiple attorneys in an urban court, judges may have long-established friendships with one or more of the lawyers. In a small community, judges frequently know all of the attorneys; however, this does not mean that judges must disqualify themselves in every case, but rather, judges must determine on a case-by-case basis whether a relationship creates a conflict of interest.

The members agreed that the committee should submit a letter to the JEAC requesting an omnibus advisory opinion. The letter should provide links or references to existing opinions from other states, including Utah and Florida, on social media use by judges. The letter should also request guidance on ethical issues pertaining to judicial staff.

Action: The Chair requested that committee staff survey judges and judicial staff regarding their ethical concerns about using social media and new technology. Those concerns will be included in the committee's letter to the JEAC.

The members also discussed a recommendation to the Judicial Staff Education Committee concerning production of an instructional video for widespread distribution to court staff. A video could educate court staff on using social media appropriately.

3. Jury admonition: The Chair requested staff to describe changes to the draft jury admonition. Staff explained that the current version included his stylistic revisions as well as several revisions suggested by Judge Barton.

> **Motion:** A member then moved to adopt the current version of the admonition, with the amendments proposed by Judge Barton. The motion received a second and it passed unanimously. **Wireless 12-010**

The members voiced appreciation for the voir dire submitted by Judge Mackey. Upon further consideration, the members agreed that it would be useful for the Bench Book to include questions to prospective jurors about their use of new technology and social media.

Action: Judge Conlogue will request from judges statewide their suggestions for additional voir dire on this subject.

4. Revisions to Rule 122.1: This led to a discussion on the enforcement of prohibitions under proposed new Rule 122.1. If a court posts a warning on the courtroom door advising that visitors may not take photographs and someone takes a photo or video anyway, is that enough to hold someone in contempt? While that conduct may be disruptive, is it contemptuous? Would it more likely be contemptuous if jurors were the subject of the photo or video? The members and David Withey, chief counsel for the Administrative Office of the Courts ("AOC"), offered factors for consideration. Did the person who took the photo read the sign on the door? Did the

person post or transmit the photo, and can the court require the person to remove it if it is already on the internet? Was the conduct intentional or innocuous? Is taking a picture under these circumstances any different that a phone ringing in court notwithstanding a sign directing visitors to silence their phones? One member noted that a contempt citation involves a variety of consequential and complex issues, among them transfer to a different judge, a "cooling off" period, the right to a jury trial, and a right to court-appointed counsel.

The AOC's assistant counsel, Jennifer Greene, offered the results of her research on contempt. She reviewed with the members Rule 33 of the Rules of Criminal Procedure concerning contempt, and other Arizona authorities. She concluded that a judge can inherently do what is necessary to maintain order in a courtroom, and a judge can do what is necessary and appropriate in response to someone taking an unauthorized photo or a video in court. She believes that draft Rule 122.1 is sufficient authority to find this conduct contumacious, even in the absence of a sign on the door; and if the conduct is sufficiently disruptive, it is contumacious even in the absence of this proposed rule. She stated that a judge has considerable authority in dealing with unauthorized use of a camera, including seizing the device and ordering deletion of a photo or video. She said that a judge could hold a person in contempt for failing to delete a photo after the judge ordered the person to do so; the contempt would be civil because the person could avoid the sanction by deleting the photo.

The members agreed that judges must know their options when unauthorized camera use occurs. Judge Downie suggested that judges obtain education about controlling their courtrooms. Most court visitors will abide by a judge's requests without the need for a contempt citation. Judges are reticent to hold people in contempt, and too much emphasis on the contempt power might encourage its overuse. If a judge issues an order to remove a photo, the order should be broad enough to require deletion from sites where a person may have been transmitted it.

Action: The Chair requested Ms. Greene's assistance in preparing guidance for judges for possible inclusion in the Bench Book, and as an attachment to the committee's report. The Chair noted that the recommended text should mention that contempt is a last resort, and judges should use this authority sparingly.

The members reconsidered a blanket prohibition on use of devices in the courtroom, and concluded once again that the better course is to allow devices but to limit use if they are disruptive, or if use is contrary to the administration of justice. To clarify the committee's intent, the members agreed to remove the words "or limit use of" following the word "silence" in the first sentence of section (e) of the draft. The members also agreed to delete the word "public" in the definition of "courtroom" that was provided in section (b).

5. Revisions to the draft report: The Chair then asked for comments concerning staff's initial draft of the committee's report to the Arizona Judicial Council ("AJC"). In the second sentence of the executive summary, a member suggested that the word "hands" should replace "palms;" but another member thought the second sentence lacked impact, and that staff should delete it

and should convey instead that electronic devices are small and easily portable. Judge Conlogue noted that the report should mention the recommended voir dire.

Action: The Chair requested the members to send specific revisions to staff.

The Chair invited further general comments. Judge Rash inquired whether a sentence in the draft's discussion of Rule 122, that "the majority of committee members share this latter point of view," was accurate. The "latter point of view" was a statement "that the public has been educated about the judicial system because of the presence of news cameras, and that even a few seconds of court news create a perception that court is open and accessible." Judge Rash believes that snippets of coverage do little to educate the public, and that coverage sometimes reports only dramatic events while omitting a balanced and broader perspective of a court proceeding. Ms. Phillips agreed that stories are sometimes superficial, but the stories may prompt viewers to learn more from other sources. The members agreed to retain the first portion of the sentence, but to delete the second half. The Chair observed that the Court years ago settled the fundamental, preliminary question of whether cameras should be in the courtroom by its adoption of Rule 122 permitting cameras.

6. Rule 122: The members proceeded to discuss the current draft of Rule 122, starting with proposed section (m) and the use of personal audio recorders by journalists. Staff related a comment from the Committee on Superior Court, which noted that anyone could bring a portable device into the courtroom; but allowing only credentialed journalists to use the devices to audio record treats them and members of the public unequally. One member noted that the reason journalists can do this is to take notes so they can accurately write a story, whereas members of the public are not writing news articles. The Chair inquired whether the purpose of recording is to take notes, or to broadcast the audio; the current rule is not specific. If the audio is for broadcast, is court approval required? Another member asked why there should be a distinction between a credentialed journalist and a professional or other blogger. The Chair noted that proposed Rule 122.1 generally allows audio recording. [Rule 122.1 allows use of devices by the public in courtrooms "to retrieve or to store information."] Moreover, if a rule disallowed recording, could the court enforce it? The members decided to delete the word "credentialed" in the current draft of section (m), but otherwise, proposed section (m) and related provisions in draft Rule 122.1 will remain as written in the drafts.

The members also discussed proposed section (l)(5) regarding a prohibition of camera coverage of victims in a criminal proceeding. Staff advised that the Commission on Victims in the Courts had requested changes to the text of this prohibition to allow the victim to "opt in" to coverage, rather than requiring the victim to "opt out." The consensus of the committee after discussing this request was to retain the current language in the draft, which provides that a victim in a criminal proceeding "may request" that they not be covered. Mr. Bodney noted that a victim's request not to be shown on camera is not solely determinative, but it is one of multiple factors a judge must consider under section (e). The members agreed that the text of section (l)(5) should be revised to reflect this. Judge Downie added, and the members agreed, that a judge should have the authority under this provision to make a *sua sponte* determination that there be no

coverage of a victim, for example, when there is a child victim and no one else has made the request on behalf of the child. The members discussed revisions to section (f) to assure its compatibility with section (l)(5), but concluded that revisions to section (f) were unnecessary. They declined to include amendments to Criminal Rule 39 within a petition to amend Rule 122.

The members next discussed section (c), and the notice requirement. Mr. Bodney requested that the draft be modified to specify that a 48-hour notice is not required if a proceeding is scheduled on less than 48-hours notice, such as a hearing in an election case or for a temporary restraining order. The members agreed and noted that the existing rule may provide useful guidance in drafting the required revisions. The members agreed that staff should make these revisions. If a reporter did not submit a non-exigent request within 48-hours because of the reporter's oversight, the request is untimely; but a judge should still consider it, although not necessarily before the start of a proceeding. The members further discussed that section (c) of the draft uses a standard of "days" as well as one of "hours," but the members agreed that a reference to two time standards was reasonable in the context of this section. A member also suggested addition of the words "on this request" to the sentence in section (c) regarding standing.

In section (d) regarding objections, the members agreed to remove in the second sentence the portion after the words "at any time." The members also agreed to remove the first sentence of section (h) in the current draft, which states that equipment must remain outside the courtroom, because this sentence is unnecessary. The sentence in section (h) beginning with the words "the judge may direct" should be broken into two sentences; and staff should revise the provision regarding public funds so that it states, "the judge may not require that public funds be used." The members agreed that section (i) should refer to "additional" cameras in lieu of "more than one" camera. Finally, Mr. Bodney noted that there has been a change in the law about juvenile proceedings being open to the public, and the members agreed that section (l)(4) should provide that coverage of juvenile proceedings is only as allowed by Arizona law.

7. Roadmap: At the Chair's request, staff noted the calendar for future events. The events include staff's progress report to the Presiding Judges, on October 24; and further progress reports to the Committee on Limited Jurisdiction Courts, on October 31; and to the Committee on Superior Court, on November 2. The committee's report to the Arizona Judicial Council is due by November 30, for presentation at the AJC's December meeting. If the AJC approves the committee's recommendations concerning rule changes, the committee must file rule petitions by January 10, 2013. The rule petitions would then be open for public comments during the following months, and the committee would thereafter have an opportunity to file a formal reply to those comments. The Court would consider the petitions at its August rules agenda. Because A.O. 2012-22 directs that the committee "shall continue as long as necessary to complete its work," the committee's duties will probably extend into the second half of 2013. The Chair noted that this committee would need to reconvene on November 7 to finalize its report to the AJC, but that members would be able to attend remotely via WebEx.

8. Call to the Public; Adjourn: There was no response to a call to the public. The meeting adjourned at 2:05 p.m. The next meeting date is **Wednesday, November 7, 2012.**